



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
P.O. BOX 621  
HONOLULU, HAWAII 96809

MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: October 29, 2003  
TIME: 9:00 am  
PLACE: DLNR Board Room  
Kalanimoku Bldg.

**A. CALL TO ORDER**

Chairperson Peter T. Young called the meeting of the Commission on Water Resource Management to order at 9:03A.M.

**B. ROLL CALL**

The following were in attendance:

**MEMBERS:** Mr. Peter T. Young, Mr. Clayton Dela Cruz, Ms. Stephanie Whalen, Mr. James Frazier

**STAFF:** Ernie Lau, Dean Nakano, Roy Hardy, Ed Sakoda, Glenn Bauer, Lenore Nakama, Charley Ice, Kevin Gooding, Neil Fujii, Faith Ching

**EXCUSED:** Dr. Chiyome Fukino, Ms. Meredith Ching

**COUNSEL:** Linda Chow

**OTHERS:** Kapua Sproat, Rosemary Liu, Chester Lao, Gordon Tribble, Steve Anthony, Steve Gingerich, Manabu Tagomori, Robert Singlehurst, Robert Creps, Kat Brady, Ron Englund, Theresa Dawson, Jerry B. Norris, Jeffrey Pearson, Jean Creadick, Bruce Dunford, Regina Hidano, Loren Lasher, Dennis Toyama, and Douglas Toews

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties.

**C. ACCEPTANCE OF AGENDA**

Deputy Director Ernest Lau had a change in the agenda. Mr. Lau suggested that the Executive Session be taken up after the reports.

**D. APPROVAL OF MINUTES**

There were four Commissioners present and we did have quorum for the October 29, 2003 meeting. However, Chairman Young stated that the Commission needed to defer the July 16, 2003 as well as the September 17, 2003 meeting minutes because of lack of quorum.

**E. CORRESPONDENCE/ANNOUNCEMENTS by Deputy Director Ernest Lau**

None

**F. OLD BUSINESS**

Deputy Director Ernest Lau stated that the Supreme Court denied the Writ of Mandamus request by Maui Meadows Homeowner's Association. They were asking the Supreme Court to designate the Iao-Waihee Aquifer.

**G. NEW BUSINESS**

- 1. Grace Pacific Corporation, APPLICATION FOR A WATER USE PERMIT, Lower Makakilo Well (Well No. 2104-01), TMK 9-1-16:04, New (Dust Control; Landscape Irrigation) Use for Additional 0.044 mgd (0.168 mgd Total), Ewa-Kunia Ground Water Management Area, Oahu**

PRESENTATION OF SUBMITTAL: Lenore Nakama

AMENDED RECOMMENDATION:

Staff recommends that the Commission approve the issuance of Water Use Permit No. 664 to Grace Pacific Corporation for the additional reasonable and beneficial use of 0.044 million gallons per day of ground water for dust control and landscape irrigation from the Lower Makakilo Well (Well No. 2104-01), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

1. Should an alternate permanent source of water be found for this use, the Commission reserves the right to revoke this permit, after a hearing.
2. The water use permit shall be an interim permit. The duration of the interim permit shall be until treated wastewater is available and acceptable for use.

3. The permittee is put on notice that this is a qualified approval in that this permit may be modified or revoked prior to the expiration of the interim permit if the Commission decides that the use of additional basal ground water for dust control and landscape irrigation is not a reasonable-beneficial use.
4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
5. The permittee is encouraged to use drought-tolerant landscaping to conserve water.

Commissioner Frazier suggested that staff consider adding under recommendation 2, that the applicant shall continue discussions with Board of Water Supply on the use of reclaimed water.

MOTION: Frazier/Whalen  
To approve the amended submittal.  
UNANIMOUSLY APPROVED.

**2. Application for a Stream Channel Alteration Permit (SCAP-OA-361), City and County of Honolulu, Department of Design and Construction, Stabilize Streambank to Reduce Erosion, Waihe'e Stream, Kahaluu, Oahu (TMK (1) 4-7-12:20)**

PRESENTATION: Mr. Ed Sakoda

Heavy rain in 2002 resulted in the erosion of Waihe'e Streambank, makai of Ahilama Road. The concrete slab under Nona Wong's flower packing facility is being seriously undermined. The applicant would like to replace a collapsed retaining wall with a concrete rubble masonry wall to reduce erosion and stabilize the streambank. The project is sponsored by the City's Department of Design and Construction with funding from the United States Department of Agriculture Natural Resources Conservation Service. It is under an emergency watershed protection program.

RECOMMENDATION:

That the Commission approve a stream channel alteration permit to construct a concrete rubble masonry wall at TMK: 4-7-12:20, Waihe'e Stream, Kahaluu, Oahu.

The permit will be valid for two (2) years subject to standard permit conditions for stream channel alteration permits in Exhibit 5.

Commissioner Whalen asked why the permit is valid for two years when the work only takes three months? Mr. Sakoda stated that it was a standard and sometimes it takes that long to get started.

MOTION: Dela Cruz/Frazier  
To approve the submittal.

## UNANIMOUSLY APPROVED

**3. Modification of Designation Trigger for Waihe'e Aquifer System Area (60103) as a Ground Water Management Area, Wailuku, Maui**

PRESENTATION: Roy Hardy

Roy Hardy gave a PowerPoint presentation outlining the history of the automatic designation triggers, for Iao and Waihe'e Aquifer System Areas from the Commission's November 21, 2002 decision, in relation to the new information on water level elevations at the Kanoa Test Hole Well. The presentation emphasized that the new information raises new issues not considered by the Commission at its decision last year. It is unknown if the new information just applies to the Kanoa Test Hole Well or it is indicative of lower water levels at other wells in the Waihe'e Aquifer System Area. Steady water levels and very low chloride concentrations in pumped wells in the area do not indicate an immediate problem and seem to contradict what is implied if all wells in the area are lower than previously believed by over 2 ft. Staff requested that the Commission wait until January 2004 for the National Geodetic Survey to submit its report on resurveyed benchmarks for all the wells in Waihe' e Aquifer System Area before deciding if the intentions of the water level trigger have been met.

Gordon Tribble, District Chief, U. S. Geological Survey Water Resources Division, Hawaii , presented a timeline recap of where they are headed with the Commission, Department of Water and the National Geodetic Survey. In February 2002, USGS started measuring depth to water at the Kanoa Test Hole, a benchmark was established but unknown. In November 2002, the triggers were established. In January 2003, USGS contacted an engineering firm that established benchmarks in 1989. After NGS established a new benchmark at Kanoa Well, USGS transferred it back to the test hole and found that water levels in the Kanoa Well are between 4.5 ft. to 5 feet.

Chairman Young asked if there was a sense of urgency on the emergency for the context of the safety of the people using the Aquifer or is the urgency to get the information as soon as possible? Question from Chairman Young is, if we wait until January are we putting people at risk?

Deputy Lau urged the Commissioners to not jump into designation as the order says at this time. We will have a better understanding of what's happening in the next couple of months. We are working with the Maui Department of Water Supply to perform a recovery test, to stop pumping for a period of time and measure the water level recovering. For the long term we have a request in through the DLNR Budget to drill a deep monitor well through the transition zone so we can monitor the movement of the transition zone. It is hoped that it will get to the Legislature and get appropriated.

Commissioner Frazier asked that we establish a timeline and report back in December.

Deputy Lau stated that we would give an update report in December to see if we're meeting our timeline.

Commissioner Whalen had a question on the benchmark resurveying method. Mr. Tribble explained the process. State Geologist, Glenn Bauer noted the accuracy of the GPS equipment being used.

Commissioner Frazier mentioned that in the management of water resources Waihe'e is smaller than Iao, is there going to be an adjustment to assure that the Waihe'e Aquifer is not jeopardized?

Deputy Director from the Maui Department of Water Supply, Jeffrey Pearson stated that the DWS is doing their best to balance the pumping and keep the pumping at the Waihe'e Aquifer to near 4 million gallons a day. Mr. Pearson stressed that they will not change their pattern in the pumpage and continue to work together.

Ms. Kat Brady, Assistant Executive Director for Life of the Land testified how concerned they were about Maui's water situation. Something is wrong when taro farmers have dying crops and dried up streams and hotel owners never have a problem getting a permit for their golf courses or their waterfall. As the population continues to grow the urgency is there as water is life. Water should be treated as a social and cultural good and not primarily as an economic commodity.

Mr. Jerry Norris from the Office of Hawaiian Affairs stated that the triggers set in November 2002 meeting were based on erroneous data and had the correct information been available Waihe'e should have been designated a ground water management system in 2002. OHA supports the immediate designation of the Waihe'e Aquifer as Ground Water Management Area.

Kapua Sproat, Attorney for EarthJustice representing Maui Meadows Homeowners Association urged the Commissioners to comply with the trigger for automatic designation that the Commission established back in November 2002.

Ms. Sproat emphasized five points briefly, the first, "is that under Hawaii's Constitution this Commission has a public trust obligation to protect, control and regulate Hawaii's resources for the benefit of the people. Although the public trust doctrine applies to all Water Resources in Hawaii without exception or distinction, the Hawaii Supreme Court has made clear that this Commission cannot fulfill that obligation until it designates an area as a water management area. The Code adopts a precautionary and protective standard in order to do this. It requires this Commission to designate an area where the water resources may be threatened, not are threatened but may be threatened by either existing or proposed withdrawals of water." Ms. Sproat's second point is, "that the Commission's automatic trigger for designation specifically states that if the water levels at the Kanoa Test Hole falls

below +6 feet elevation at any time, the Waihe'e Aquifer System shall be designated as a Ground Management Area. Importantly, the automatic trigger could have but was not defined in terms of a relative change in water level. When the Commission set this automatic trigger last November 2002, it could have said, "if the water level in the Kanoa Test Hole drops (declines) by 1.00 feet the aquifer will automatically be designated. Instead, the Commission articulated the trigger as a single, absolute number, under which the water level should not be allowed to fall.

The minutes of the November 20, 2002 Commission meeting confirmed that the automatic trigger for Waihe'e was established as an absolute minimum. The minutes explained that the trigger "would relate to the depth of the transition zone or the midpoint of the transition zone for the Waihe'e system." "The minutes also state in no uncertain terms, if the water level based on the 12 month moving average for the Kanoa Test Hole falls below the 6 foot elevation at any time, the Waihe'e Aquifer System would be automatically designated as a Ground Water Management Area."

Ms. Sproat's third point is that the current chloride levels in the Kanoa Test Hole don't justify deferring designation. "Additional survey work by the National Geodetic Survey, coordination of efforts between this commission and other federal, state, and county agencies, as well as the drilling of a deep monitor well in Waihe'e would be helpful. Maui Meadows, however, supports such action only if it complements not supplants designation.

Ms. Sproat's fourth point is, "even assuming that (1) the automatic trigger had not been satisfied, (2) that current water levels were not roughly three feet below, the equilibrium Head for the Kanoa Well Field and below the equilibrium head for North Waihe'e, (3) current water levels in Waihe'e were not at a value at which wells will intrude into the top of the transition zone, or (4) there was no lag time between the drop in water levels and the rise in the transition zone. Any scientific uncertainty provides no reason to delay designation. On the contrary, where a resource is threatened, the precautionary principle demands immediate attention action. This is mandated by the Code, which requires designation where water resources may be threatened. It is also required under the public trust doctrine." Miss Sproat further states that it is prudent to adopt precautionary principles in protecting the resource. Lack of full scientific uncertainty should not be a basis for postponing effective measures to prevent environmental degradation. In furtherance of these trust obligations, this Commission must "make reasonable precautionary presumptions or allowances in the public interest." The recommendation deferring designation is the contrary.

Ms. Sproat's fifth and final point, "is that the Hawaii Supreme Court has held that a statutory basis is necessary for an administrative body to initiate reconsideration of its prior final quasi-judicial decisions. The Court ruled that absent an express statutory basis for reconsideration, an agency "had no power to reconsider its earlier decision, regardless of whether there was an error of fact or law." Since the Water Code does not provide this Commission with an express provision allowing reconsideration of designation decisions, the Commission has no power to reconsider its final action regarding Maui Meadows'

petition to designate the Iao and Waihe'e Aquifers and lacks the discretion to do anything other than designate the Waihe'e Aquifer as a Ground Management Area.

Miss Sproat concluded that the Commission reconsider and designate today and start that process. If we find out in January 2004 that this is an anomaly and that the resource is not threatened, we can undesignate.

Chairman Young stated that there is still a lot of questions and waiting until January 2004 does not appear to be a significant risk. Making a decision should be based on clear information and not inaccurate data as done in the past.

Miss Sproat stated that assuming that the information is correct now her concern is where the water level is now because of the lag time.

Chairman Young stated that he needed to have a discussion with the Deputy Attorney General regarding issues of a legal nature relative to this decision-making.

At 10:43 A.M. Commissioner Frazier made a motion to move to Executive Session, Whalen, seconded.

At 11:30 A.M. the meeting resumed.

#### AMENDED RECOMMENDATION:

Commissioner Frazier moved that the Commission accept the recommendation of Staff that includes the three points in the submittal and add a fourth point.

Due to the magnitude of the uncertainty introduced within the Waihe'e Aquifer System area by the new elevation information at Kanoa Test Hole and the necessary supplemental information from the anticipated December elevation resurvey report by NGS for all MDWS wells, staff recommends that the Commission:

1. Defer designation action on the Waihe'e Aquifer System area required by the now questionable Kanoa Test Hole water-level trigger as established on November 20, 2002.
2. Direct staff to continue coordinating and working with the MDWS, USGS, and NGS to further investigate, review, and define the magnitude and accuracy of water level changes in the Waihe'e Aquifer System (60103) area.
3. Direct staff to report back to the Commission at its January meeting on the results and staff analysis of the NGS December elevation resurvey report and provide recommendations for amending the Kanoa Test Hole trigger #4 for designation of the Waihe'e Aquifer System area as a ground water management area.

4. That Maui Board of Water Supply shall not pump the Waihe'e System at a greater than 4 mgd on a monthly average basis until the Staff reports back to the Commission."

Whalen seconded the motion.

To approve the amended submittal.

UNANIMOUSLY APPROVED

## **H. REPORTS**

PRESENTATION: Mr. Ed Sakoda

Third Quarterly Report (July 1 – September 30, 2003), Implementation of Lalakea Alternative Mitigation Project (LAMP)

Mr. Manabu Tagomori from KSBE stated the arrangement that the Commission offered for LAMP. KSBE is to submit a written report to the Commission on a quarterly basis and appear before the Commission on a semi-annual basis. Kamehameha Schools did appear in June 2003 and made a presentation. Their next appearance is January 2004.

Dr. Ron Englund from the Bishop Museum made a PowerPoint presentation on behalf of KSBE. Two main areas in the Lalakea Project are 1) Scientific Research Project and 2) Educational Community participation. We are presently collecting baseline data of the diverted streams and after the streamflow is restored we will be looking at how the stream is going to recover. We'll monitor the aquatic algae, which is the whole basis of stream life. We are also assessing the stream invertebrates. Native gobiid fish and a parasite assessment of the alien fish, stream habitat is being mapped by the GIS system that has been developed by Jim Parham, we are also looking at the stream flow and water quality monitoring.

The mission of this project is to basically examine the natural processes of the flow restoration in the Hi'ilawe - Lalakea Streams. With Bishop Museum being the lead they are working closely with other agencies especially DLNR/DARS (Division of Aquatic Resources), USGS, University of Hawaii, CWRM and some mainland institutions. DARS has done fish point counts, collected parasites from the harmful fish species, we've held educational community meetings to get input.

We are also doing quantitative sampling of the aquatic insect population, which is an important food source for the native fish.

In summary, it is a 3-year study assessing impacts of Lalakea Streamflow restoration, 1 year of baseline data, 2 years of data after the flow is restored.

For the record, Ms. Kapua Sproat of EarthJustice represents the Waipi'o Valley Community Association. They are the ones that initially brought the petition that led to this settlement. Before the flow can be restored, the petition needs to be ruled on and it has not been done.



yet. Because of budgetary constraints the application was submitted in February 2002 and the Commission has been waiting for funding to take the Commission meeting to Honoka'a. On behalf of the Waipi'o Valley Community Association Ms. Sproat asked if there is no funding at this point could the Commission please have the meeting here on Oahu so that the application can be ruled on and the water can be put back in the stream.

**L. TOPICS FOR FUTURE COMMISSION MEETINGS**

Deputy Attorney General, Yvonne Izu will conduct a Basic Water Law Code briefing in Executive Session at next month's Commission Meeting. This will cover Domestic, Native Hawaiian and Instream Uses.

**J. NEXT COMMISSION MEETINGS**

December 17, 2003

January 21, 2004

**K. UPCOMING EVENTS**

Deputy Ernest Lau will follow up on the Lalakea issue.

At 11:55 A.M. Commissioner Frazier moved that the Commission move into Executive Session, Commissioner Whalen seconded.

**L. ADJOURNMENT**

The meeting was adjourned at 12:21 P.M.

MOTION: (Frazier/Whalen)  
UNANIMOUSLY APPROVED

Respectfully submitted,

PAULYNE ANAKALEA  
Secretary

APPROVED AS SUBMITTED:

ERNEST Y.W.LAU  
Deputy Director